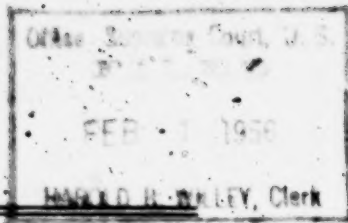


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SUPREME COURT, U.S.



In the  
**Supreme Court of the United States**

OCTOBER TERM 1955

No. 65-31

MASSACHUSETTS BONDING AND INSURANCE  
COMPANY AND KATHLEEN F. CROWLEY,  
ADMINISTRATRIX OF ESTATE OF  
JEREMIAH C. CROWLEY,  
*Petitioners,*

UNITED STATES OF AMERICA,  
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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FOR THE FIRST CIRCUIT**

---

To the Honorable, the Chief Justice of the United States  
and to the Associate Justices of the Supreme Court of the  
United States:-

This is a petition by Massachusetts Bonding and  
Insurance Company and Kathleen F. Crowley, Ad-

ministratrix of the Estate of Jeremiah C. Crowley, for a writ of certiorari to review a judgment and opinion of the United States Circuit Court of Appeals for the First Circuit rendered in this case on October 31, 1955. Your petitioners' petition for rehearing was denied on December 15, 1955. The opinions of the Circuit Court on the appeal and on the petition for rehearing are included in the Record Pages 13-24, 27-37. These opinions have not as yet been printed in the reports.

### **Jurisdiction**

The judgment of the Circuit Court of Appeals now sought to be reviewed was dated and entered October 31, 1955 (R.p. 24). The order denying your petitioners' petition for rehearing was dated and entered December 15, 1955 (R.p. 37). On December 23, 1955 the said Circuit Court ordered the mandate stayed until further order of the Court to permit filing of this application for a writ of certiorari (R.p. 37). This Court has jurisdiction to review this judgment by writ of certiorari under the provisions of 28 U.S.C. Sec. 1254.

### **Questions**

The sole question is whether or not the actual or compensatory damages recoverable against the United States under the Federal Tort Claims Act, as amended, for a wrongful death caused by an employee of the United States in Massachusetts are limited to \$20,000., the maximum amount of punitive damages recoverable under the Massachusetts punitive death statute from a private employer for a wrongful death under like circumstances.

**Statutes Involved**

28 U.S.C. Sec. 1346 (b) provides as follows:

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Sec. 2674 as amended, provides as follows:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively,



for whose benefit the action was brought, in lieu thereof.

Mass. G.L. (Ter. Ed.) C.229 Sec. 20, as amended, provides as follows:

Except as provided in sections one, two and two A, a person who by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by sections four and ten of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section one.

### Statement of the Case

This is an action against the United States under the Federal Tort Claims Act, 28 U.S.C. Secs. 2671-2680, brought in the United States District Court for the District of Massachusetts to recover money damages for the wrongful death of Jeremiah C. Crowley, which occurred at the Watertown Arsenal, Watertown, Massachusetts, December 22, 1952. The action was commenced by the Massachusetts Bonding and Insurance Company, insurer of the deceased's employer under the Massachusetts Workmen's Compensation Laws, and subsequently the plaintiff, Kathleen F. Crowley, Administratrix of the estate of the deceased.

joined in the action as party plaintiff. Jurisdiction was conferred upon the United States District Court by 28 U.S.C. Sec. 1346 (b). After trial, the District Court (Wyzanski, D. J.) found and ruled that Crowley's death was caused by the negligent act of a government employee, that the United States was liable for compensatory damages measured by the pecuniary injuries to Crowley's widow and children pursuant to the provisions of the second paragraph of 28 U.S.C. Sec. 2674, that such damages totaled \$60,000. and that the damages so determined are not limited by the maximum and minimum figures set forth in the Massachusetts Death Statute, Mass. G.L. (Ter. Ed.) C. 229, Sec. 2C (R.p. 10). Judgment was entered in favor of the plaintiffs for \$60,000. damages in accordance with these findings and rulings (R.p. 11) and the United States appealed to the Circuit Court of Appeals. The findings of the District Court as to liability and the amount of pecuniary injuries were not challenged by this appeal and the sole question presented was whether or not the damages recoverable against the United States in this case may exceed the statutory maximum of \$20,000. contained in the Massachusetts Death Statute (R.p. 14). The Circuit Court of Appeals has decided that while the Massachusetts Death Statute is purely punitive and the damages recoverable for wrongful death against the United States must be measured by the pecuniary injuries to those for whose benefit the action is brought under the terms of the second paragraph of 28 U.S.C. Sec. 2674, as amended, when such compensatory damages exceed the amount of punitive damages that can be assessed under the Massachusetts Death Statute against a private employer for a wrongful death under like circumstances they must be cut down to that amount.



## Argument

I. THIS CASE PRESENTS AN IMPORTANT ASPECT OF THE EXTENT OF THE LIABILITY OF THE UNITED STATES UNDER THE TORT CLAIMS ACT, WHICH HAS NOT AND SHOULD BE SETTLED BY THIS COURT.

This is the first action against the United States for a wrongful death which raises the question here presented. The District and Circuit Courts agree that the Massachusetts Death Statute is punitive in nature, and that the 1947 amendment to the Tort Claims Act,<sup>1</sup> now contained in the second paragraph of 28 U.S.C. Sec. 2674, must be applied in this case to determine the way damages are to be measured. The point in issue is whether the Courts should give full effect to the plain language of that paragraph as written, or, by the process of judicial interpretation, make the determination that the Congress intended to limit the amount of compensatory damages measured by pecuniary loss to the maximum recoverable under local punitive death legislation for wrongful death under like circumstances.

At the present time only Massachusetts has a punitive death statute of general application which places minimum and maximum limits on the recovery. Hence, the questioned decision of the Circuit Court creates a binding precedent for the disposition of all cases which are likely to arise in the foreseeable future.<sup>2</sup> It is obvious that this

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<sup>1</sup> C. 446, 80th Cong., 1st Sess., approved August 1, 1947 (61 Stat. 722). Under the revision of the Judicial Code the new provisions inserted by this amendment become the second paragraph of 28 U.S.C. Sec. 2674 (62 Stat. 869, 992).

<sup>2</sup> Alabama has a punitive death statute of general application but there are no minimum or maximum limits on the amount of recovery. See *Heath v. United States*, 85 F. Supp. 196 (D.C.N.D. Ala. 1949). Punitive death statutes, applicable only to deaths caused by railroads

is a matter of importance to the dependents of all persons losing their lives through actionable misconduct of government employees in Massachusetts. In addition, this decision establishes an important precedent for the use of the process of judicial interpretation to limit the liability of the United States under the Tort Claims Act in a manner not required by the terms of that Act.

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS BASED UPON A POLICY OF STATUTORY INTERPRETATION WHICH IS IN DIRECT CONFLICT WITH THAT ADOPTED BY THIS COURT FOR THE INTERPRETATION OF THE TORT CLAIMS ACT IN *Indian Towing Co. v. United States*, 350 U.S. 61.

The Circuit Court of Appeals agrees with your petitioners that read literally, and in isolation, the language of the second paragraph of '28 U.S.C. Sec. 2674 requires the award of full compensatory damages in the case at bar (R.p. 22). However, the Court concludes that when read as a whole, the Tort Claims Act, as amended, does not express with sufficient clarity the intentions of Congress with respect to the matter now in issue, and it becomes the duty of the Court "to ascertain the intention of Congress" by the usual methods (R.pp. 14 and 28). The Court, therefore, considers the results of a literal interpretation of the per-

and other carriers, are in effect in Colorado, Missouri and New Mexico. 1935 Colorado Stats. c. 50, Sec. 1, as amended by Laws 1951, p. 338, Sec. 1 (damages between \$3000 and \$10,000). 1941 New Mexico Stats. Anno. 24-104, as amended by 1947 Laws, c. 125, Sec. 1 (damages fixed at \$10,000) 1949 Missouri Rev. Stats. 537.070 (damages between \$2000 and \$10,000). Hence, it is possible for claims for wrongful death to arise from government operation of railroads in those states which would raise the question presented in this case.

Of the 46 states with compensatory death statutes of general application only about a dozen place some maximum limit on the amount of the recovery (R. p. 20).

tinent language and finds that what it calls an incongruity and discrimination which the Congress could not have intended, in that the United States may be required to pay greater damages than can be imposed upon a private employer in Massachusetts alone of all the States which limit the recovery for wrongful death (R.p. 22). To remove this incongruity, and what it believes unintended consequence of giving effect to the language of the act as written, it rules that the maximum limit of Massachusetts Death Statute constitutes the ceiling for compensatory damages recoverable from the United States for wrongful death.

Such intrusion by the Courts by judicial interpretation to modify or curtail the liabilities assumed by the United States in the Tort Claims Act was condemned in the recent case of *Indian Towing Co. v. United States*, decided November 21, 1955, 350 U.S. 61. In answer to the government's argument for an interpretation of the Act which would exclude liability for negligence in maintenance of a lighthouse because state agencies incur no such liability when performing similar functions, this Court states, at page 68: "The language of the statute does not support the government's argument." Thus, the principle of giving full effect to the language of the Act and of construing liberally the grant of remedies therein contained was reaffirmed. See *United States v. Yellow Cab Co.*, 340 U.S. 543, 555.

Your petitioners submit that the Circuit Court decision in the instant case is based on a policy of statutory interpretation which is directly contrary to that so recently reaffirmed by this Court in the *Indian Towing Co.* case. In fact, the reasons given by the Circuit Court for its decision are those of the dissenting minority in that case.

In the *Indian Towing Co.* case, the minority of this Court, finding no private individuals engaged in providing lighthouse or similar public services, would restrict the rights

of recovery to those which the state law allows against the agencies which do perform such functions, in order to carry out the supposed intention of Congress that the United States should not be subjected to greater liability than to that imposed by state law in comparable situations. In the instant case, the Circuit Court, finding no equivalent liability of an individual for compensatory damage for wrongful death under Massachusetts law, would restrict the rights of recovery to those which the state law allows by way of punitive damages in order to carry out the same Congressional intent. Both of these opinions renounce and condemn a literal interpretation of the pertinent language of the Act which would subject the United States to greater liability.

The majority of this Court, by the *Indian Towing Co.* decision, refused to recognize any such paramount legislative intent which controls the interpretation of the plain language of the Tort Claims Act. The ruling of this Court that the language pertinent to the facts in that case must be given its plain meaning is equally applicable to the present case. When it thus refused to permit a departure from the express language of the Act to limit the liability of the United States in a manner which considerations of justice and expediency might require it decided the fundamental issue of the present case in favor of your petitioner's contentions.

### III. THE CIRCUIT COURT'S INTERPRETATION OF THE PROVISIONS OF THE TORT CLAIMS ACT IS UNWARRANTED AND CONTRARY TO THE EXPRESS PROVISIONS OF THE ACT.

Your petitioners dispute the statement of the Circuit Court that there is any "regrettably cloudy phraseology of the 1947 amendment to the Tort Claims Act" which requires the resort to extrinsic matters for its interpretation (R.p. 28). Your petitioners also deny the logic of the Circuit Court's argument that because Congress adopts all provisions of the punitive death statute other than those dealing with the way damages are to be measured it is warranted in concluding that Congress intended to adopt the maximum limitation on punitive damages as the ceiling for the substituted compensatory damages. On the contrary, your petitioners maintain that the language used in this amendment is clear and unambiguous, and when read in context with the original Tort Claims Act there can be no reasonable doubt of the legislative intent to grant the right to full compensatory damages measured by pecuniary loss, independently of, and without reference to, the penalties imposed by the local law on private employers under like circumstances.

*A. The 1947 amendment clearly expresses the legislative intent to allow full compensatory damages in lieu of punitive damages in the actions for wrongful death to which it applies.*

The plain purpose of the 1947 amendment is to provide for the recovery of compensatory damages for wrongful death caused by employees of the United States in places where the death statutes are wholly punitive in nature. In order to do this and still retain the principle that the United



States should be subjected to liability only when a private individual would be liable, this amendment was enacted which accepts liability under the state death statute in all respects up to the point of assessment of damages, and then provides that the carefully defined federal rule for figuring compensatory damages shall be applied in lieu of any state rules for fixing punitive damages.

It is apparent that Congress recognized that all actions for wrongful death are based upon statutes which set forth the conditions for imposition of liability, identify the persons who may sue and for whose benefit suit may be brought, and prescribe the way damages are to be assessed. Accordingly, the objectives of this amendment were achieved by merely substituting the compensatory for the punitive measure of damages, retaining all the other elements of the state statute relating to liability. Thus it was made certain that the United States would be called upon to pay compensatory damages only when an individual would be required to pay punitive damages under the state law. By the addition of the words "in lieu thereof" at the end of this provision Congress also made certain that the compensatory damages defined therein were in full substitution for the rejected punitive damages. If the penal limit on such damages is now superimposed upon this compensatory measure of damage the latter can no longer be said to be truly compensatory.

*B. The literal interpretation of the 1947 amendment does not result in any unwarranted or unintended discrimination.*

It is entirely consistent and logical for Congress to respect state policy in limiting compensatory damages for wrongful death, as it has in the Tort Claims Act, by providing that the United States shall be liable only to the



same extent as private individuals, and, at the same time, allow the recovery of full compensatory damages when no such policy is present. Massachusetts has no policy, one way or the other, with respect to this matter of limiting compensatory damages for wrongful death. It allows recovery in its courts of full compensatory damages in wrongful death actions created by the laws of another state, even though that other state will not permit its courts to enforce the Massachusetts Death Statute because of its punitive nature. *Jackson v. Anthony*, 282 Mass. 540, 546-547 (1933). *McGrath v. Tobin*, R.I. , 103A 2d 795 (1954).

Consequently, there is no justification for the charge that discrimination results from following the language of the 1947 amendment and subjecting the United States to liability for full compensatory damages on wrongful death claims arising in Massachusetts, thus putting Massachusetts in the same class as all other states which do have a policy of limiting compensatory damages for wrongful death. In fact, the discrimination would be against Massachusetts claimants if Massachusetts were classified with those states having such a policy, for none of those states guarantee a minimum recovery once liability for wrongful death is established. The assurance given by the Massachusetts Death Statute of a \$2,000. award without any proof of damage is a valuable right which tends to compensate for the maximum limitation on the possible recovery. There being no such compensating advantage from a limited compensatory death statute, Massachusetts claimants are prejudiced by being classified with those states having such statutes.

*C. There is no justification for retaining the maximum and rejecting the minimum limitation on punitive damages contained in the Massachusetts Death Statute.*

The Massachusetts Death Statute provides for the assessment of punitive damages in the sum of not less than \$2,000. or more than \$20,000. against a private employer based on the degree of culpability of the negligent employees involved. The Circuit Court agrees that the minimum limitation of \$2,000. cannot be applied against the United States because of the prohibition against punitive damages (R.p. 32). Yet it holds that it is not inconsistent to apply the maximum of \$20,000. When Congress rejected the punitive measure of damage did it not necessarily reject both the minimum and maximum limitations on such damage? Such limitations are an integral part of the Massachusetts statutory scheme for supplementing the criminal laws dealing with homicide with punitive death actions imposing penalties that are relinquished by the state to the surviving next of kin. "Like all punitive legislation the death statutes prescribe the extent of the punishment." *Porter v. Sorell*, 280 Mass. 457, 461. It must be presumed that the Congress knew punitive death statutes generally follow this pattern.

The sole purpose of the amendment which inserted the provision in question was to grant the right and define the remedy for wrongful death. To hold that the clear grant therein contained of the right to full compensatory damages for wrongful death was unintentional, imputes to Congress an inconceivable carelessness in draftmanship. Furthermore, when existing United States statutes, such as the Federal Employers Liability Act (45 U.S.C. Secs. 51-59), allow the recovery of full compensatory damages for wrongful death in places such as Massachusetts, how can it be said that conformity with state policies of allow-

ing only limited damages, punitive or compensatory, requires such a strained construction of this Act. Under all the circumstances it would seem more appropriate to let Congress further amend this Act if the results of the plain meaning of the language it used to define the remedy for wrongful death in places allowing only a punitive recovery were not intended.

### Conclusion

Compensatory damages can never be equated to punitive damages. It appears that the Congress was well aware of this fact when it chose to substitute a federal rule for compensatory damages measured by pecuniary loss for the punitive damages recoverable for wrongful death under local death statutes. The Circuit Court would do what the Congress could have done but failed to do, that is, place a limit on those damages equal to the maximum punitive liability on private individuals under like circumstances. Your petitioners contend that such judicial interpretation of this important provision of the Tort Claims Act is improper, particularly in the light of the principles and policies established by this Court for the interpretation of this Act.

For the reasons herein set forth your petitioners respectfully submit that a writ of certiorari should be granted in this case.

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